United Nations A/CN.9/609

General Assembly

Distr.: General
4 May 2006

Original: English/Spanish

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Note by the Secretariat

Contents

		Page
I.	Introduction	2
II.	Comments received from Member States and international organizations	3
	A. Member States	3
	Guatemala	3
	Italy	5

V.06-53824 (E) 290506 290506

I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that priority items for the Working Group should be: the requirement of written form for the arbitration agreement contained in article 7 (2) of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law") and article II (2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"),[1] as well as enforceability of interim measures of protection.[2]

2. The Working Group finalised its work on the draft legislative provisions regarding interim measures and the form of arbitration agreement as well as on the draft declaration regarding the interpretation of article II (2), and article VII (1), of the New York Convention at its forty-fourth session (New York, 23-27 January 2006). By a note verbale dated 21 March 2006, the Secretary-General transmitted the texts of the draft legislative provisions on interim measures and the form of arbitration agreement as well as the draft declaration regarding the interpretation of articles II (2) and VII (1) of the New York Convention, as annexed to the report of the Working Group on that session (A/CN.9/592) to States and to intergovernmental and international non-governmental organizations that are invited to attend the meetings of the Commission and its working groups as observers. Short notes on each text were issued separately (A/CN.9/605 on the draft legislative provisions on interim measures, A/CN.9/606 on the draft legislative provisions on the form of arbitration agreement, A/CN.9/607 on the draft declaration regarding the interpretation of articles II (2), and VII (1), of the 1958 New York Convention).

3. The present document reproduces the first comments received by the Secretariat on draft legislative provisions on interim measures and the form of arbitration agreement as well as on the draft declaration regarding the interpretation of articles II (2) and VII (1) of the New York Convention. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Member States and international organizations

A. Member States

Guatemala

[Original: Spanish]
[28 April 2006]

Comments from Guatemala on the amendments to the UNCITRAL Model Law on Arbitration

I have the honour to transmit below comments on the draft provisions to be included in the amendments to the UNCITRAL Model Law on Arbitration (the Model Law). It was my understanding that the comments should be as concrete as possible, and they are that. However, if the Permanent Mission considers that some comments should be more detailed, I stand ready to assist.

In the first place, it should be recognized that interim measures and preliminary orders have attracted particular interest and gained special significance as an area where progress could be made with arbitration regulations that offer greater possibilities to arbitrators and arbitral tribunals as regards the power to decree or prescribe such measures or orders. That is one of the main reasons why for the past two years or so work has been under way in Guatemala on a draft law, submitted by the Supreme Court, whose purpose it is to assign greater coercive powers to arbitrators as regards the capacity to decree or prescribe such measures.

It should be mentioned that this exercise has been criticized by the person who is preparing this report, on the grounds that it aims to give direct coercive powers to arbitrators, enabling them to decree such measures without any judicial support or help; in other words, it aims to confer "*jus imperium*" on arbitrators with regard to interim measures or anticipatory measures or preliminary orders. It would seem that the proposal prepared by the relevant working group during the forty-fourth session (held in New York from 3 to 27 January 2006) is not only more reasonable in that respect but also more in line with the overall contents of the Model Law.

That having been said, there follow detailed comments on the analysed text.

Article 17 (1)

The following wording is suggested: (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of any party, grant interim measures (it is suggested that the word A be replaced by ANY).

This semantic change creates a broader or more balanced impression of the situation for all parties to the arbitral process.

Article 17 (2)

No actual change in wording is suggested, but it is suggested that thought be given to the use of the word "laudo" [award] to denote the means by which an interim measure might be granted. Although the reason for using that word is clear,

being linked principally to the executive force of the word when used in a State's jurisdictional tribunals, in some jurisdictions it may give rise to confusion insofar as it refers to the final conclusion of legal proceedings ("laudo" is equivalent to "sentencia" [judgement], and in ordinary or jurisdictional proceedings interim measures are granted through preliminary orders or decisions). Perhaps the expression "laudo interino" [interim award] could be used, as, I believe, it is in other jurisdictions, and, if it were used, perhaps a definition of this type of "laudo" [award] could be added to the article of the Model Law containing the definitions.

If the use of the expression "laudo interino" [interim award] were accepted, where reference is made in Article 17 (2) to "a subsequent award" the expression "laudo definitivo" [final award] would have to be used in the subparagraph in question.

Article 17 bis

Subparagraph (1) (a)

It is suggested that, instead of the words "no resarcible" [not reparable], use be made of "no reversible" [irreversible] or "irreparable".

Subparagraph (1) (b)

It is suggested that this subparagraph be deleted. In the Guatemala jurisdiction it could be used as a means of impugning or discrediting the arbitrators on the grounds that they had advanced in some way or other an opinion about the claims of one of the parties. Perhaps it would be better simply to indicate, in this or some other provision of the Model Law amendment proposal, that the arbitrators shall decide on the measures in respect of which they are competent, or to establish a higher standard of care for the arbitrators as regards their decision whether or not to grant such measures.

Section 2

It is suggested that in the first line "a toda demanda" [to a request] be replaced by "a todo requerimiento" [the English version would probably not be affected]. If this change were acceptable, it would have to be made in other provisions as well—for example, in Article 17 ter. Similarly, it is suggested that in various articles of the proposal the word "demandante" in the phrase "demandante de una medida cautelar" [party requesting an interim measure] or "demandante de una orden preliminar" [party requesting a preliminary order]* be replaced by "solicitante" or "requirente".

* *Translator's note*: The phrase "demandante de una orden preliminar" does not appear to occur in A/CN.9/592.

Article 17 ter

As the term "Órdenes preliminares" [Preliminary orders] is not used in all jurisdictions in their laws relating to legal procedure,[1] perhaps, as with "medidas cautelares", a definition of that term should be included.

It would be useful to know more about the relationship, in the case in question, between preliminary orders and interim measures, in order to decide whether it is necessary to make further comments regarding this and other articles.

Further to the previous comment, the regulation relating to the recognition and enforcement of interim measures should be examined more thoroughly, as it would appear that these are thought of principally in the context of international arbitrations, whereas in some jurisdictions, such as that of Guatemala, the Model Law has been adopted as domestic legislation covering both international and national arbitrations. It will be necessary to determine whether the proposed regulation applies equally to national arbitrations. Finally, as regards the revised legal provisions relating to the form of the arbitral agreement there is only one comment, as follows.

Article 7 (3)

The following wording is suggested:

"An arbitration agreement shall be in writing if there exists any record or documentary evidence of its contents, regardless of whether the agreement or the contract of which it is a part was concluded orally, through the execution of certain legal documents or by some other means."

Italy

[Original: English]
[3 May 2006]

Comments on Draft legislative provisions on interim measures and preliminary orders (Annex I)

Under the present status of Italian law on arbitration, arbitrators are not granted the power to issue interim measures or preliminary orders. The Italian view of the matter is that such power ought to be reserved to the exclusive benefit of the Court of competent jurisdiction. This fundamental choice of the Italian legal system is not expected to change in the near or foreseeable future. Thus, the proposed new UNCITRAL rules on interim measures and preliminary orders are unlikely to be adopted, in whole or in part, by the Republic of Italy. This would be even more stringent for interim measures recognized *inaudita altera parte*. The Italian Delegation had already submitted in the past comments and proposals on the above, that are reiterated and recalled here.

Assuming however that, notwithstanding the above, the Commission may still find it useful to receive comments from an Italian perspective on such proposed new rules, the following comments are offered.

[1] In Guatemala at least, the term is not used in laws relating to civil and trade law procedure. Instead, the terms "medidas cautelares", "medida's preventivas" or "medidas de garantia"are used.

1. The entire Chapter IV bis (from Article 17 to Article 17 undecies) is drafted in a very detailed and analytical form and in a legal style that, it is submitted, is likely to be accepted without difficulties only by countries which belong to the common law tradition.

Adoption by countries, such as Italy, belonging to the civil law tradition would encounter less difficulties, if a more concise style were adopted and more reliance were placed on the traditional gap-filling function of national procedural rules governing in each country the exercise of summary jurisdiction on grounds of urgency.

2. It would be appropriate to make it clear (whether in the text of the Draft provisions or in an official Commentary or in the Guide to Enactment) that in Chapter IV bis the word "party" may only mean a "party to the arbitration agreement", not a third party whose position may be affected by the interim measure or the preliminary order, but whose consent to being subjected to the jurisdiction of the arbitral tribunal is lacking.

Article 17 quater (2) provides a good illustration of a provision whose legal certainty would benefit, it is submitted, from the insertion of the above suggested clarification.

3. In the light of the strong opposition that was voiced by a number of delegations within the Working Group against the opt-out formula which was ultimately selected in Article 17 (1) and Article 17 ter (1), the Commission may wish to reconsider the advisability of offering a final text, in which an opt-in formula may be added as an alternative solution.

Thus, as an alternative to "Unless otherwise agreed by the parties", the final text could also offer the possibility of choosing, as an opening statement of Article 17 (1) and Article 17 ter (1), the words "If so agreed by the parties" or any other equivalent wording.

Comments on Draft legislative provisions on the form of arbitration agreement (Annex II)

Annex II offers a new revised "long" text of Article 7 ("Definition and form of arbitration agreement") and an alternative "short" text ("Definition of arbitration agreement").

A preference is expressed for the "long" main proposal, whose underlying intent is to introduce an important distinction, deserving approval.

Concisely stated, the distinction is between the certainty of the parties' will to arbitrate and the certainty of the rules designed to govern the conduct of the arbitration proceedings.

Whilst in many national legal systems the written form of the arbitration agreement is still required for the purposes of achieving the first type of certainty (i.e., the certainty of the will to arbitrate), the proposed revision of Article 7 (long text) intends to achieve a radical change of perspective, by shifting the focus on the second type of certainty (i.e., by aiming at securing the certainty of the rules designed to govern the conduct of the arbitration proceedings).

In substance, the proposed revision of Article 7 (long text) liberalizes the manner in which the parties may express their will or consent to arbitrate (this may

be done even "orally, by conduct or by other means"), whilst the form requirement is still imposed for the different purpose of making sure that there is a "recorded" certainty of the rules, by which the arbitration will be conducted.

The key provision is Article 7 (3), in respect of which the Commission is called to assess whether the underlying intent of achieving certainty of the arbitration rules would be better served by defining the form requirement by reference to a record of the "terms" (first option in square brackets) or by reference to a record of the "content" (second option in square brackets) of the arbitration agreement.

A strong preference is expressed herein for the use of the word "content" as opposed to "terms", since "content" appears to better describe the prescriptive internal substance of an agreement for which the law requires the use of an external form.

However, this is merely the indication of the preferable choice between "terms" and "content". The Commission may well wish to consider the advisability of adopting a different and more satisfactory wording of the entire Article 7 (3), provided always that the fundamental choice of prescribing the form requirement for the sole purpose of the certainty of the arbitration rules is preserved in its substance.

Comments on Draft declaration regarding the interpretation of article II, paragraph (2) and article IV, paragraph (1), of the New York Convention (Annex III)

A favourable opinion is expressed in support of this Draft declaration.

Although it may be difficult to assess in precise legal terms how effective, if adopted, the declaration may be in reducing the present lack of uniformity in the interpretation of the New York Convention, it would be unrealistic to assume that a different and more ambitious solution would have greater chances to succeed.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 344-350 and 380.

[2] *Ibid.*, paras. 371-373 and 380.